Docket No. 06156 OCT 21 2007

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SUPREME COURT OF THE UNITED STATES

WALLACE

v.

ABELL, et al.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN WALLACE, Pro Se Petitioner
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(Related to EDPA Civil No. 05-06022
Third Circuit No. 06-3361
Bivens Action)

QUESTIONS PRESENTED FOR REVIEW

1. Are Special Masters (who adjudicate vaccine compensation cases) of the Federal Claims Court the embodiment of Congress since they completely lack all technical skills specified by Congress when establishing their office?
2. Although Special Masters are not required to use the FRCP or the Federal Rules of Evidence may they knowingly/wilfully/ intentionally deprive a litigant of Substantive/ Procedural Due Process of Law and Equal Protection guaranteed by the Constitution?
3. If Special Masters are not the embodiment of Congress (and they are not) regarding 75% of their job, the technical part, are their orders in extremely technical cases of any legal effect?

4. May a Special Master (Judge) order a litigant to secure a scientific protocol in a few weeks, that not even top scientists in the field can prepare in years, and which not even the late Chief Justice could secure, then dismiss the case when litigant cannot perform it in a few weeks, or does this violate Due Process? (This does not include monetary issues.)

5. May US Attorneys commit attorney fraud on the District Court to "defend" the Government by confusing a case to seek its dismissal when this Court proscribes fraud?

6. May Court personnel (Appeals Ct. Fed. Cir.) lawfully deny access to Courts by violating Substantive and Procedural Due Process of Law and Equal Protection and the FRAP?

LIST OF PARTIES

Petitioners:
John Wallace
Margaret Wallace,Wife
Heather Wallace, Daughter, Child #1
Cosette Wallace, Daughter, Child #2
Grace Wallace, Daughter, Child #3
Daniel Wallace, Son, Child #4
Faith Wallace, Daughter, Child #5
Joy Wallace, Daughter, Child #6
Joshua Wallace, Son, Child #7
Samuel Wallace, Son, Child #8
David Wallace, Son, Child #9
Jonathan Wallace, Son, Child #10
Aimeé Wallace, Daughter (Deceased), Child #11
Unborn Child (Deceased), Child #12
Unborn Child (Deceased), Child #13
Victoria Wallace, Daughter, Child #14

Respondents:
Richard Abell, Special Master, Fed. Claims Court
J. Brian Bishop, Clerk of Court, Fed. Claims Court
Unknown Federal Employees, Fed. Claims Court
Others Unknown, law clerks, et al., Fed. Claims Ct.
Jan Horbaly, Clerk of Court, Appeals Ct, Fed. Cir.
Others Unknown, law clerks, et al., Fed. Appls. Ct.

Note: These are all the Respondents in original case. The two US Attorneys were added as Respondents in a Supplemental Pleading for fraud on Dist. Ct.

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BASIS FOR JURISDICTION

Denial of Rehearing en banc in 06-3316 by the Third Circuit Court was entered on 6 March 2007.

Judgment by the Third Circuit Court in 06-3316 was entered 1 February 2007.

The statutory provision conferring jurisdiction to review the judgment in question on this Court on a writ of certiorari is 28 U.S.C. § 2101(e).

CONSTITUTIONAL PROVISIONS/STATUTES

United States Constitution, Fifth Amendment

> No person shall…be deprived of life, liberty, or property, without due process of law….

STATEMENT OF CASE

This petition seeks review of a decision of the United States Court of Appeals for the Third Circuit which exercised jurisdiction to review under 28 U.S.C. § 1291, holding the appeal was from the final order of a District Court and was an appeal as of Right under Rule 3 of the FRAP.

The District Court had jurisdiction pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), Federal Question Jurisdiction, 28 U.S.C. §§ 1331 and 2201, and the Fifth and other Amendments of the United States Constitution, specifically Due Process of Law and Equal Protection.

The District Court case 2005 CV-6022 was entered 17 November 2005. The case charged that

the Petitioners, members of the same Family, had been deprived of Rights in two prior cases, Wallace v. DHHS, 96-188V in the Federal Claims Court and 04-5062 in the Appeals Court for the Federal Circuit. 04-5062 is the appeal arising from 96-188V.

96-188V was entered Pro Se, and after losing two attorneys who subsequently handled the case, became Pro Se at the end before the Special Master ruled against the Petitioners.

96-188V alleged Petitioner Aimeé Wallace, aged 18 months died from the effects of a vaccine strain virus administered to her as part of the childhood immunization program. Prior to her death she infected all the remaining Family members due to the "closed community" contact principle seen in military bases, prisons, and similar environments.

Case 97-836V was entered in the Federal Claims Court for the remaining Family members, two of whom, unborn children #12 and #13, died. This is not the subject of this Petition as stated several time in District Court case 2005 CV-6022.

In the course of 2005 CV-6022, two US Attorneys "defending" the Federal actors confused issues intentionally to derail the case. It was simple attorney fraud on the District Court. These US Attorneys achieved dismissal under the FTCA, even though this case is a Bivens action, quite unrelated to an FTCA action. The unlawful acts of the two US Attorneys against Petitioners were voluminous and material, the Petitioner entered them as Defendants in the same case 2005 CV-6022 for cause on 28 February 2006 in a Supplemental Pleading.

Their fallacies claimed Petitioner sued the Federal Claims Court and the Appeals Court for the Federal Circuit, seeking dismissal by making it appear Petitioner had sued the Courts themselves. They also added the "Other Parties" and "Necessary and Indispensable Parties" as Defendants, creating as much confusion as they could to effect dismissal.

Coming back to the underlying cases 96-188V and 04-5062, the Bivens action 2005 CV-6022 was brought because personnel in those Courts wilfully, knowingly, and intentionally deprived the Petitioners of Substantive and Procedural Due Process of Law and Equal Protection under the Fifth Amendment. The US Attorneys claimed the Petitioner was suing the Courts themselves which is not possible under any cause of action.

Early on in 96-188V Petitioners obtained an exhaustive expert witness report from world known Viera Scheibner and filed this in the case. Before filing the Bivens action Petitioner checked to see if this report was still in the record, and it was.

From 1996 to dismissal in November 2005, Special Master Richard Abell of the Federal Claims Court scrupulously avoided this expert report, never making of Petitioners' expert report in all those years. The report showed conclusively Petitioner Aimeé Wallace died from a vaccine strain polio virus administered in childhood immunization.

Prior to dismissal of 96-188V, Respondent in that case DHHS brought in an expert witness with 50 years or so paper experience. The Special Master accepted his word, based on his paper credentials,

and dismissed 96-188V without ever considering the Petitioners' exhaustive expert report that had lain untouched in the record for many years.

The Special Master also imposed a task that neither he, nor the late Chief Justice Rehnquist, nor anyone could accomplish, that Petitioners secure a technical protocol from experts on a viral issue. Petitioner contacted all the world experts in virology by letter, but none could provide such a protocol.

The late Chief Justice is mentioned for a reason. He had an illness and tried to find a protocol to defeat it, but failed. By law, he was also the top legal mind in the Country, but none of his expertise thwarted death. The Special Master requested a task that was plainly impossible, and when it could not be achieved, dismissed the case because of it.

The story gets better at this point. The Special Master and those in the Clerk's Office of the Claims Court "neglected" to send Petitioner the final order so a timely appeal could be made. It was the honorable Attorney for DHHS the Respondent in 96-188V who called Petitioner about the dismissal, but the time for a timely appeal had already passed.

Petitioner appealed anyway because the FRAP make provision for an order not received. The Appeals Court for the Federal Circuit took Petitioners' money and assigned docket number 04-5062. However, when Petitioner sent in the appeal, the Appeals Court for the Federal Circuit claimed it was "late" in spite of their former docketing.

Petitioner sued for deprivation of Substantive/ Procedural Due Process of Law/Equal Protection.

In preparing 2005 CV-6022 Petitioner proved conclusively Special Masters are not the embodiment intended by Congress since none have a technical background, and all were mere lawyers. Congress intended Special Masters be scientists able to handle technical issues of vaccine science, with only enough law to deal with obvious legal issues.

Special Master Abell is the senior Special Master at the Claims Court, and Petitioner claims respectfully after talking with him in many status conferences by phone that he is totally "ignorant" in vaccine technical issues. Petitioner can say this with surety because he (Petitioner) is a scientist of many years, though not in vaccine science. However, the "ignorance" of Special Master Abell is apparent. 96-188V was adjudicated by an unqualified Judge.

ARGUMENT

We have before us these points:

1. Is Richard Abell the embodiment of a Special Master intended by Congress since he totally lacks ability in technical matters comprising at least 75% of his job and impairing his ability to adjudicate properly?
2. Can a Special Master order an impossible task, to find a protocol no leading scientist in the world can make without years of effort?
3. Can Court personnel deprive of Substantive/ Procedural Due Process of Law and Equal Protection under the Fifth Amendment by thwarting justice/denying access to Courts?
4. Can a Special Master ignore the major piece of evidence, not saying a word about it for years,

then accept a few comments of a paper

"expert", or does this deprive of Rights?

5. Does Judicial accountability really exist?

Two Justices of this Court describe the deprivation of constitutional Rights in other cases :

Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967), Justice Douglas dissenting:

> Today's decision is not dictated by our prior decisions. In Ex parte Virginia, 100 U.S. 339, the Court held that a judge who excluded Negroes from juries could be held liable under the Act of March 1, 1875 (18 Stat. 335), one of the Civil Rights Acts. The Court assumed that the judge was merely performing a ministerial function. But it went on to state that the judge would be liable under the statute even if his actions were judicial.
>
> We should, of course, not protect a member of the judiciary "who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good." Gregoire v. Biddle, 177 F.2d 579, 581.

This is not to say that a judge who makes an honest mistake should be subjected to civil liability. **It is necessary to exempt judges from liability for the consequences of their honest mistakes**.

But that is far different from saying that a judge shall be immune from the consequences of any of his judicial actions, and that he shall not be liable for the knowing and intentional deprivation of a person's civil rights. What about the judge who knowingly turns a trial into a "kangaroo" court?... **The plight of the oppressed is indeed serious.**

6 A judge is liable for injury caused by a ministerial act; to have immunity the judge must be performing a judicial function. See, e. g., Ex parte Virginia, 100 U.S. 339; 2 Harper & James, The Law of Torts 1642-1643 (1956). The presence of malice and **the intention to deprive a person of his civil rights is wholly incompatible with the judicial function. When a judge acts intentionally and knowingly to deprive a person of his constitutional rights he exercises no discretion or individual judgment; he acts no longer as a judge, but as a "minister" of his own prejudices**.

341 US 123, 162-162, Justice Frankfurter:

> The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in periods of trouble; it protects aliens as well as citizens. But 'due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and the government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick.... It is a delicate process of adjustment inescapably involving the exercise of judgement by those whom the Constitution entrusted with the unfolding of the process.

This Court understands Judges and Court personnel do not always make "honest mistakes".

The proceedings in Claims Court 96-188V were fraught with "structural error":

> The Supreme Court has distinguished two kinds of constitutional error at trial: structural error and trial error. A structural error compromises the entire trial; it requires reversal because it involves a deprivation of a constitutional protection so basic that in its absence, "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" Arizona v. Fulminante , 499 U.S. 279, 310 (1991) (citation omitted). Examples of structural error are a biased judge, Tumey v. Ohio , 273 U.S. 510 (1927), ... Structural error cannot be harmless; Robinson v. Del Tufo, Attorney General of NJ, 92-5667 (Third Circuit)

The Special Master, avoiding the main piece of Petitioner's evidence for years, the comprehensive expert report, deprived Petitioners of Substantive/Procedural Due Process of Law/Equal Protection. He adjudicated under structural error.

This is not an "honest mistake" a fair and impartial Judge makes. It is the "kangaroo court" described by Justice Douglas, and cannot impart "that feeling of just treatment" described by Justice Frankfurter.

The underlying cases contain constitutional error of the structural type. Using Supreme Court precedent, the Third Circuit has said:

1. "A structural error compromises the entire trial."
2. "[I]t requires reversal."
3. "[I]t involves a deprivation of a constitutional protection so basic."
4. "Examples of structural error are a biased judge."
5. "Structural error cannot be harmless."

6. Regarding adjudication , no adjudication "may be regarded as fundamentally fair" when it contains structural error.

In Herrera v. Collins, 506 U.S. 390 (1993) this Court held:

> "The Due Process Clause of the Fifth Amendment provides that `No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .' This Court has held that the Due Process Clause protects individuals against two types of government action. So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," Rochin v. California, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 -326 (1937). When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). This requirement has traditionally been referred to as "procedural" due process." United States v. Salerno, 481 U.S. 739, 746 (1987).

In Davis v. Passman, 442 U.S. 228 (1979) this Court held:

> A cause of action and damages remedy can be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated. Cf. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 ; Butz v. Economou, 438 U.S. 478 . Pp. 233-249.... The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." In numerous decisions, this Court "has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws. E. g., Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n. 2 (1975); Bolling v. Sharpe, 347 U.S. 497, 500 (1954)." Vance v. Bradley, 440 U.S. 93, 95 n. 1 (1979).

In Harlow v. Fitzgerald, 457 U.S. 800 (1982) this Court held:

> [W]e have held that qualified immunity would be defeated if an official "knew or reasonably should have known that the action

he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . ." If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.

In Deshaney v. Winnebago Cty. Soc. Servs. Dept., 489 U.S. 189 (1989) this Court held:

> Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression," Davidson v. Cannon, supra, at 348; see also Daniels v. Williams, supra, at 331 ("`"to secure the individual from the arbitrary exercise of the powers of government,"' and "to prevent governmental power from being `used for purposes of oppression'") (internal citations omitted); Parratt v. Taylor, 451 U.S. 527, 549 (1981) (Powell, J., concurring in result) (to prevent the "affirmative abuse of power"). Its purpose was to protect the people from the State....

In Chavez v. Martinez, 01-1444 (2003) this Court held:

> The Due Process Clause of the 14th Amendment protects individuals against state action that either " 'shocks the conscience,' Rochin v. California, 342 U. S. 165, 172 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U. S. 319, 325-326 (1937)." United States v. Salerno, 481 U. S. 739, 746 (1987).

In Burns v. Reed, 500 U.S. 478 (1991) this Court held:

> "**As the qualified immunity defense has evolved, it provides ample support to all but the plainly incompetent or those who knowingly violate the law**." Malley, supra, at 341; see also Mitchell, 472 U.S., at 524 .

Finally, in Anderson v. Creighton, 483 U.S. 635 (1987) this Court held:

> Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary

> functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. See, e. g., Malley v. Briggs, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law")....
>
> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation.

A Judge/Special Master knowingly, wilfully, and intentionally depriving of Substantive/ Procedural Due Process and Equal Protection in the course of a proceeding is more culpable because he knows the law and chooses to adjudicate contrary to it. This is not an "honest mistake" described by Justice

Douglas, but an act worthy of accountability under 18 USC § 242. In a corresponding civil action (this case), Judicial accountability should be no less.

No man is above the law:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. United States v. Lee, 106 U.S. [196,] 220 [(1882)].

Judges, Special Masters, and even Supreme Court Justices are all "bound to obey it (the law)"

Added to this accountability of all members of the Justice System is the fact that Special Masters of the Claims Court are not the embodiment intended by Congress since all of them, particularly Richard Abell who is most senior, are incompetent in at least 75% of their job function, the scientific expertise required

to properly understand and adjudicate complex vaccine reaction cases.

REASONS FOR ISSUANCE OF THE WRIT

1. Pursuant to Rule 10(a) the Third Circuit Court "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power".

2. Pursuant to Rule 10(c) the Third Circuit Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court". Among other things, they have <u>not</u> dealt with competence of the Special Masters to adjudicate technically complex vaccine reaction cases, such as 96-188V.

3. The Third Circuit Court did not deal with deprivation of Substantive/Procedural Due Process of Law and Equal Protection which not even a Judge has the Right to deprive of in ordinary circumstances.

4. The Third Circuit Court conferred judicial immunity on certain Defendants for their knowing, intentional, and wilful deprivation of Rights under the Fifth Amendment contrary to total case law.

5. An honorable Judiciary is in the balance. Permitting Judges who knowingly, wilfully, and intentionally deprive of constitutional Rights erodes the Justice System and law which took Judges of integrity more than 200 years to build up. Now their efforts will be

brought to nothing in a few short years as more and more Judges "do their own thing".

6. The Third Circuit Court "affirmed" deprivation of constitutional Rights by the Judiciary contrary to the stand of Justices Douglas/Frankfurter, and the increasingly few present day Judges who stand for integrity. They placed these "kangaroo court" Judges (Justice Douglas' words) above the law.

7. If theoretically (but not in actuality because this Court is afraid to "make waves") Judges can be brought to justice under 18 USC § 242 for criminal deprivation of Rights, why are they unaccountable in civil actions for same?

8. In Griswold v. Connecticut, 381 U.S. 479 (1965) this Court held:

Perhaps the clearest, frankest and briefest explanation of how this due process approach works is the statement in another case handed down today that this Court is to invoke the Due Process Clause to strike down state procedures or laws which it can "not tolerate." Linkletter v. Walker, post, p. 618, at 631.

Not dealing with deprivation of Rights by the Judiciary only means this Court acquiesces to such deprivations by denial of Certiorari, etc.

9. Judgment of the Third Circuit Court is contrary to Braden v. United States, 365 U.S. 431 (1961):

[Footnote 12] These "tests" include whether the law in question "shocks the conscience," offends "a sense of justice," runs counter to the "decencies of civilized conduct," is inconsistent with "an ordered concept of liberty," offends "traditional notions of fair play and substantial justice," is contrary to "the notions of justice of English-speaking peoples," or is unjustified "on balance." See Rochin v. California, 342 U.S. 165, 175 -176 (concurring opinion); Uphaus v. Wyman, 364

U.S. 388, 392 -393 (dissenting opinion). Significantly, in none of these "tests" does the result to be obtained depend upon the question whether there has been an abridgment of rights protected by the plain language of the Bill of Rights.

10. The Judicial process failed, and this Court in Briscoe v. LaHue, 460 U.S. 325 (1983) held:

> [Footnote 32] Finally, in those cases in which the judicial process fails, the public is not powerless to punish misconduct. Like prosecutors and judges, official witnesses may be punished criminally for willful deprivations of constitutional rights under 18 U.S.C. 242.

11. The decision of the Third Circuit Court is contrary to United States v. Lee, 106 U.S. [196,] 220 [(1882)]." 438 U.S., at 506:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

12. This Court should set the example for all Courts in the world by dealing with corrupt Judges, not avoiding the issues, or further breakdown of the Justice System will occur till all Rights are suppressed and this is the legacy of this Court to the world.

13. "No man in this [Court] is above the law. No officer of the law (this Court) may set that law at defiance with impunity. All officers of [this Court] from the highest to the lowest, are creatures of the law, and are bound to obey it."

14. Public confidence in the Justice System will be restored if this Court deals with corrupt Judges who knowingly/wilfully/intentionally deprive of Rights in "kangaroo courts".

15. Our nation is at an all time low in Judicial integrity, and much of that is due to acts and/or omissions of this Court as role model.

16. Integrity demands issuance of this Writ. This requires remand to the District Court for trial of the case which is beyond the scope of this Court, except to address accountability.

The Petitioner has demonstrated beyond any doubt that the Writ of Certiorari should issue. This is to uphold the law:

> "tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public. Hazel-Atlas, 322 U.S., at 245

Not even a Judge/Special Master may "tamper[] with the administration of justice in [this] manner [since it] involves far more than an injury to a

single litigant. It is a wrong against the institutions set up to protect and safeguard the public."

Not even a Judge/Special Master may deprive of Substantive and Procedural Due Process of Law and Equal Protection, and it is more reprehensible that such deprivation occurs in a Court of law.

The Petitioner thanks the Court for Justice under the Fifth Amendment and law. Justice is the Guardian of Liberty.

Respectfully submitted,

John Wallace,
Pro Se Petitioner

Date: 21 May 2007

APPENDIX

Petition for Rehearing, Third Circuit Court,
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Note: The Plaintiff-Appellant never brought suit against (1) DHHS or its Attorney, (2) Shoemaker and Horn or its employees, (3) Viera Scheibner, (4) Office of the Attorney General or its Employees, or (5) US Attorney's Office or its Employees. This confusion was entered by the Assistant US Attorneys "defending" the Federal actors to derail the case by perpetrating fraud on the District Court. The Plaintiff-Appellant found it impossible to correct the record from their fraud, and entered them as Defendants for this fraud. The record in the District Court is replete with the Plaintiff-Appellant's exposure of their numerous instances of attorney fraud on the District Court. This fraud was carried into the Third Circuit Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3316

JOHN WALLACE; MARGARET WALLACE, Wife; HEATHER WALLACE, Daughter, Child #1; COSETTE WALLACE, Daughter, Child #2; GRACE WALLACE, Daughter, Child #3; DANIEL WALLACE, Son, Child #4; FAITH WALLACE, Daughter, Child #5; JOY WALLACE, Daughter, Child #6; JOSHUA WALLACE, Son, Child #7; SAMUEL WALLACE, Son, Child #8; DAVID WALLACE, Son, Child #9; JONATHAN WALLACE, Son, Child #10; AIMEE WALLACE, Daughter (Deceased), Child #11; UNBORN CHILD (Deceased), Child #12; UNBORN CHILD (Deceased), Child #13; VICTORIA WALLACE, Daughter, Child #14

v.

*RICHARD ABELL, Special Master (In Vaccine Compensation Cases); J. BRIAN BISHOP, Clerk of Court United States Court of Federal Claims; FEDERAL EMPLOYEES (Individuals(Un)Named in connection with the Order); OTHERS UNKNOWN TO THE PLAINTIFF AT THE PRESENT TIME CONSISTING OF LAW CLERKS, CLERKS IN THE CLERK'S OFFICE, ET AL.; JAN HORBALY, Clerk of Court of the United States Court of Appeals for the Federal Circuit; OTHERS UNKNOWN TO

THE PLAINTIFF AT THE PRESENT TIME CONSISTING OF LAW CLERKS, CLERKS IN THE CLERK'S OFFICE, ET AL.; DEPARTMENT OF HEALTH AND HUMAN SERVICES, (DHHS); VINCENT MATANOSKI, Attorney for DHHS,* Others in the Employ of DHHS who were involved in the Claims Court Case; Shoemaker and Horn; CLIFFORD SHOEMAKER, Attorney Representing Plaintiff before withdrawing; others in the employ of Shoemaker and Horn and/or Clifford Shoemaker who were involved in the Claims Court Case; VIERA SCHEIBNER, PhD, Australia, "Expert Witness" for the Plaintiff; OFFICE OF THE ATTORNEY GENERAL; CHRISTOPHER WRAY, Assistant Attorney General, Criminal Division; BRUCE OHR, Chief, Organized Crime; JOSHUA HOCHBERG, Chief, Fraud; UNITED STATES ATTORNEY'S OFFICE; PATRICK L. MEEHAN, United States Attorney; MRS. FARNAN, (Function Unknown)

John Wallace, Appellant

*(Amended in Accordance with Clerk Order dated 08/30/06)
(D.C. Civ. No. 05-CV-6022)

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge,

SLOVITER, McKEE, BARRY, AMBRO,
FUENTES*, SMITH, CHAGARES and JORDAN,
Circuit Judges

The petition for rehearing filed by appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Chief Judge

Dated: March 6, 2007
SLC/cc: Mr. John Wallace
Virginia R. Powel, Esq.

*Judge Fuentes had previously indicated that he would recuse in this matter. However, upon further review Judge Fuentes has determined recusal is not warranted. Therefore, Judge Fuentes is participating as a member of the en banc court. Mr. Wallace's motion to recuse with respect to Judge Fuentes is denied.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3316

JOHN WALLACE; MARGARET WALLACE, Wife; HEATHER WALLACE, Daughter, Child #1; COSETTE WALLACE, Daughter, Child #2; GRACE WALLACE, Daughter, Child #3; DANIEL WALLACE, Son, Child #4; FAITH WALLACE, Daughter, Child #5; JOY WALLACE, Daughter, Child #6; JOSHUA WALLACE, Son, Child #7; SAMUEL WALLACE, Son, Child #8; DAVID WALLACE, Son, Child #9; JONATHAN WALLACE, Son, Child #10; AIMEE WALLACE, Daughter (Deceased), Child #11; UNBORN CHILD (Deceased), Child #12; UNBORN CHILD (Deceased), Child #13; VICTORIA WALLACE, Daughter, Child #14

v.

*RICHARD ABELL, Special Master (In Vaccine Compensation Cases); J. BRIAN BISHOP, Clerk of Court United States Court of Federal Claims; FEDERAL EMPLOYEES (Individuals(Un)Named in connection with the Order); OTHERS UNKNOWN TO THE PLAINTIFF AT THE PRESENT TIME CONSISTING OF LAW CLERKS, CLERKS IN THE CLERK'S OFFICE, ET AL.; JAN HORBALY, Clerk of Court of the United States Court of Appeals for the Federal

Circuit; OTHERS UNKNOWN TO THE PLAINTIFF AT THE PRESENT TIME CONSISTING OF LAW CLERKS, CLERKS IN THE CLERK'S OFFICE, ET AL.; DEPARTMENT OF HEALTH AND HUMAN SERVICES, (DHHS); VINCENT MATANOSKI, Attorney for DHHS, Others in the Employ of DHHS who were involved in the Claims Court Case; Shoemaker and Horn; CLIFFORD SHOEMAKER, Attorney Representing Plaintiff before withdrawing; others in the employ of Shoemaker and Horn and/or Clifford Shoemaker who were involved in the Claims Court Case; VIERA SCHEIBNER, PhD, Australia, "Expert Witness" for the Plaintiff; OFFICE OF THE ATTORNEY GENERAL; CHRISTOPHER WRAY, Assistant Attorney General, Criminal Division; BRUCE OHR, Chief, Organized Crime; JOSHUA HOCHBERG, Chief, Fraud; UNITED STATES ATTORNEY'S OFFICE; PATRICK L. MEEHAN, United States Attorney; MRS. FARNAN, (Function Unknown)

John Wallace, Appellant

*(Amended in Accordance with Clerk Order dated 08/30/06)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civ. No. 05-CV-6022
(Honorable James T. Giles)

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 22, 2006

Before: SCIRICA, Chief Judge, SMITH and CHAGARES, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on December 22, 2006. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered June 16, 2006, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST
/s/ Marcia M. Waldron, Clerk

DATED: February 1, 2007

Costs taxed in favor Appellee as follows:
Brief $76.80
Sales Tax .....$ 5.00
TOTAL $81.80

Certified as a true copy and issued in lieu of a formal mandate on March 27, 2007

Teste: Marcia M. Waldron
Clerk, U.S. Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3316

JOHN WALLACE,
Appellant

v.

RICHARD ABELL, et al.

Present: **SCIRICA, Chief Judge, SMITH and CHAGARES, Circuit Judges**

It is hereby ORDERED that the motion for stay of mandate is DENIED because no substantive right of the appellant will be affected by failure to grant the stay of mandate. This is without prejudice to the appellant's right to file a timely petition for writ of certiorari.

/s/ Anthony J. Scirica
Chief Judge

Dated: March 27, 2007
CRG/cc: Mr. John Wallace
Virginia R. Powel, Esq.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3316

JOHN WALLACE; MARGARET WALLACE, Wife; HEATHER WALLACE, Daughter, Child #1; COSETTE WALLACE, Daughter, Child #2; GRACE WALLACE, Daughter, Child #3; DANIEL WALLACE, Son, Child #4; FAITH WALLACE, Daughter, Child #5; JOY WALLACE, Daughter, Child #6; JOSHUA WALLACE, Son, Child #7; SAMUEL WALLACE, Son, Child #8; DAVID WALLACE, Son, Child #9; JONATHAN WALLACE, Son, Child #10; AIMEE WALLACE, Daughter (Deceased), Child #11; UNBORN CHILD (Deceased), Child #12; UNBORN CHILD (Deceased), Child #13; VICTORIA WALLACE, Daughter, Child #14

v.

*RICHARD ABELL, Special Master (In Vaccine Compensation Cases); J. BRIAN BISHOP, Clerk of Court United States Court of Federal Claims; FEDERAL EMPLOYEES (Individuals(Un)Named in connection with the Order); OTHERS UNKNOWN TO THE PLAINTIFF AT THE PRESENT TIME

CONSISTING OF LAW CLERKS, CLERKS IN THE CLERK'S OFFICE, ET AL.; JAN HORBALY, Clerk of Court of the United States Court of Appeals for the Federal Circuit; OTHERS UNKNOWN TO THE PLAINTIFF AT THE PRESENT TIME CONSISTING OF LAW CLERKS, CLERKS IN THE CLERK'S OFFICE, ET AL.; DEPARTMENT OF HEALTH AND HUMAN SERVICES, (DHHS); VINCENT MATANOSKI, Attorney for DHHS, Others in the Employ of DHHS who were involved in the Claims Court Case; Shoemaker and Horn; CLIFFORD SHOEMAKER, Attorney Representing Plaintiff before withdrawing; others in the employ of Shoemaker and Horn and/or Clifford Shoemaker who were involved in the Claims Court Case; VIERA SCHEIBNER, PhD, Australia, "Expert Witness" for the Plaintiff; OFFICE OF THE ATTORNEY GENERAL; CHRISTOPHER WRAY, Assistant Attorney General, Criminal Division; BRUCE OHR, Chief, Organized Crime; JOSHUA HOCHBERG, Chief, Fraud; UNITED STATES ATTORNEY'S OFFICE; PATRICK L. MEEHAN, United States Attorney; MRS. FARNAN, (Function Unknown)

John Wallace, Appellant

*(Amended in Accordance with Clerk Order dated 08/30/06)

On Appeal from the United States District Court

for the Eastern District of Pennsylvania
D.C. Civ. No. 05-CV-6022
(Honorable James T. Giles)

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 22, 2006

Before: SCIRICA, Chief Judge, SMITH and CHAGARES, Circuit Judges

(Filed: February 1, 2007)

OPINION OF THE COURT

PER CURIAM.

Appellant John Wallace and his wife Margaret filed a claim in 1997 for compensation under the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1 et seq., alleging that the polio vaccinations received by their daughter Aimée led to her death and the death of another of their children.[1]

Toward the end of lengthy proceedings, the case was assigned to Special Master Richard Abell of the Office of Special Masters of the United States Court of Claims. On October 28, 2005, Special Master Abell filed a decision in the Wallaces' case, finding that, although they had had ample time to do so, they had provided no expert medical opinion to support their claim. See Wallace v. Sec'y of Health and Human Services, 2005 WL 3132463, at *3 (Fed. Cl. October 28, 2005) ("Petitioners have proffered no evidence that their medical theory - implicating the polio virus with the injuries alleged - is plausible.") The petition was dismissed pursuant to a judgment on November 30, 2005.

A prior petition by Margaret Wallace on behalf of Aimée was dismissed with prejudice by Special

Master Abell on November 20, 2003 for failure to prosecute. After the government submitted an expert report from Dr. Jerome Klein, Special Master Abell directed Mrs. Wallace to secure a qualified medical expert to respond to Dr. Klein's report. She did not secure a qualified medical expert as directed. See Wallace v. Sec'y of Health and Human Services, 2003 WL 23218075 (Fed. Cl. November 21, 2003). Mrs. Wallace appealed, but her appeal was dismissed on procedural grounds by the Clerk of the United States Court of Appeals for the Federal Circuit, Jan Horbaly, for failure to file a brief within the time required by Federal Rule of Appellate Procedure 31(a). See Wallace v. Sec'y of Health and Human Services, 101 Fed. Appx. 340 (Fed. Cir. June 4, 2004) (Clerk's Order).

On November 17, 2007, John Wallace sued Special Master Abell, Horbaly and the Clerk of the Court of Federal Claims, J. Brian Bishop, in United States District Court for the Eastern District of Pennsylvania, alleging that they had violated his civil rights, see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Special Master Abell was alleged to have acted without jurisdiction and to have issued improper rulings, Bishop was alleged to have failed to timely notify Wallace of the Special Master's decisions, and Horbaly was alleged to have improperly terminated his appeal to the Federal Circuit, all in violation of his rights to due process. Wallace asked for money damages and prospective relief in the form of having his vaccine case reinstated, with all prior adverse

orders vacated; he also sought the recusal of Special Master Abell. The District Court granted the defendants' motion to dismiss, and dismissed the complaint in an order entered on June 16, 2006. Wallace appeals.

We will affirm. The complaint was properly dismissed by the District Court. An individual acting in a judicial capacity is absolutely immunized from a suit for money damages, Stump v. Sparkman, 435 U.S. 349 (1978), even if acting erroneously, corruptly, or in excess of jurisdiction, see Mireles v. Waco, 502 U.S. 9, 11 (1991). Special Master Abell, serving as a neutral adjudicator by appointment of the United States Court of Federal Claims, is shielded from suit for the performance of judicial acts of the type alleged here. See Forrester v. White, 484 U.S.

219, 228-29 (1988). We find appellant's arguments to the contrary unpersuasive. The same reasoning applies to Horbaly, who, as Clerk of the Federal Circuit Court, exercised discretion in ordering that Wallace's appeal be dismissed on procedural grounds to a lawfully enacted federal rule.[2] These two judicial actors also are shielded from a suit for prospective relief under the Federal Courts Improvement Act, Pub.L. No. 104-317, 110 Stat. 3847 (1996) (amending 42 U.S.C. § 1983 to provide that "injunctive relief shall not be granted" in an action brought against "a judicial officer for an act or omission taken in such officer's judicial capacity," "unless a declaratory decree was violated or declaratory relief was unavailable').[3]

Bishop is shielded from a suit for damages by the doctrine of qualified immunity. See Williams v. Wood, 612 F.2d 982, 985 (5th Cir, 1980) (entering order and notifying parties is routine, nondiscretionary duty). Assuming, arguendo, that Bishop had the duty to provide timely notice of the Special Master's decisions, but see Rule 53(e), Rules of the Court of Federal Claims ("A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.") , and, accepting as we must for purposes of Rule 12(b)(6) that the duty was breached here, Conley v. Gibson, 355 U.S. 41, 45-46 (1957), the doctrine of qualified immunity protects him unless he acted in a plainly incompetent manner or knowingly violated the law, see Malley v. Briggs,

475 U.S. 335, 341 (1986), which Wallace has not argued in his brief on appeal. Wallace did not seek prospective relief with respect to this defendant.

We will affirm the order of the District Court dismissing this complaint.

[1] Aimée died on April 15, 1994, seven weeks after her third polio vaccination. The cause of death was determined to be dehydration following acute enteritis.

[2] Federal Rule of Appellate Procedure 31 provides:

(a) Time to Serve and File a Brief.
(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing.

* * * *

(c) Consequences of Failure to File. If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

Fed. R. App. Pro. 31(a)(1), (c)

[3] See Butz v. Economou, 438 U.S. 504 (1978) (no distinction for purposes of immunity between state official sued under section 1983 and federal official sued under Bivens).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN WALLACE, ET AL.
Plaintiffs

v.

UNITED STATES COURT OF FEDERAL CLAIMS, ET AL.,
Defendants

CIVIL ACTION NO. 05-6022

ORDER

_____AND NOW, this 15th day of June, 2006 upon consideration of federal defendants Motion To Dismiss, it is hereby

ORDERED

that said Motion is granted. The Complaint is hereby dismissed with prejudice as to the Federal Defendants, the United States Court of Federal Claims, Richard Abell, Special Master, Brian Bishop,

Clerk of Court, United States Court of Appeals for the Federal Circuit, Jan Horbaly, Clerk of Court, Department of Health and Human Services (DHHS), Vincent Matanoski, Office of the U.S. Attorney General, Christopher Wray, Bruce Ohr, Joshua Hochberg, (Department of Justice employees or former Department of Justice employees), United States Attorney's Office for the Eastern District of Pennsylvanis, Patrick L. Meehan, United States Attorney, and Mrs. Farnan. Under law, each defendant is immune from suit.

BY THE COURT:

Honorable James T. Giles
Judge, United States District Court

Entered June 16, 2006